

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAO KANG LIN,)	
)	
Petitioner,)	CASE NO. C05-660RSM
)	(CR01-158RSM)
v.)	
)	
UNITED STATES OF AMERICA,)	ORDER DENYING MOTION
)	UNDER 28 U.S.C. § 2255
Respondent.)	
_____)	

On August 25, 2005, the Honorable Monica J. Benton, United States Magistrate Judge, issued her Report and Recommendation (“R&R”) in this case. (Dkt. #13). Petitioner subsequently filed Objections to that R&R. (Dkt. #16).

The Court, having reviewed petitioner’s § 2255 motion, Judge Benton’s R&R, petitioner’s objections, and the remaining record, does hereby find and Order:

- (1) The Court adopts the Report and Recommendation. Petitioner has responded that he did not default on his *Booker* claim because he preserved it throughout the course of his appeals. (Dkt. #16 at 3-4). However, as Judge Benton noted in her R&R, the Court did not reach that part of respondent’s arguments. (See Dkt. #13 at 4). Accordingly, the undersigned District Judge will also not address those arguments. In addition, petitioner apparently asks the Court to ignore established law, and redetermine the holding of *Booker* based on *Ex Post Facto* and due process

ORDER DENYING § 2255 MOTION

1 considerations. (Dkt. #16 at 4-25). The Court declines to undertake such an analysis.
2 As Judge Benton correctly noted, the Ninth Circuit Court of Appeals has recently held
3 that *Blakely* – and therefore *Booker* – does not apply retroactively to cases on
4 collateral review. *See Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005); (Dkt. #13 at
5 3-4). This Court is bound by that Court of Appeals decision. Accordingly, Judge
6 Benton correctly determined that petitioner may not rely upon *Booker* in support of his
7 motion to vacate. Finally, the Court acknowledges petitioner's continued assertions of
8 an ineffective assistance claim, but adopts Judge Benton's recommendation pertaining
9 to that claim without further comment.

- 10 (2) Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C.
11 § 2255 (Dkt. #4) is DENIED.
- 12 (3) The Clerk is directed to send copies of this Order to petitioner, to counsel for
13 respondent, and to Judge Benton.

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15 DATED this __14__ day of November, 2005.

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18 RICARDO S. MARTINEZ
19 UNITED STATES DISTRICT JUDGE
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